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IN THE
Supreme Court of the United States
October Term, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
against

RICHARD N. MORASH,
Respondent.

On Appeal from the Supreme Judicial Court of
the State of Massachusetts

**BRIEF OF AMICI CURIAE STATE OF NEW YORK,
ET AL. IN SUPPORT OF PETITIONER, THE
COMMONWEALTH OF MASSACHUSETTS**

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Statement of Interest of Amici Curiae

This brief is filed on behalf of 12 states as *amici curiae* pursuant to Rule 36.1 and 36.4 of the Supreme Court Rules, in support of the petition for a writ of certiorari filed by petitioner, the Commonwealth of Massachusetts, in the above-entitled case.

The issues raised by the appeal in this case are of critical importance to all states, including New York and the 11 other *amici* joining in this brief. The Supreme

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Judicial Court of the Commonwealth of Massachusetts has held that the preemption provision of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* bars a state from criminally prosecuting an employer who violates an agreement to pay an employee for unused vacation time.

In New York and the other *amici* states, state governments actively assist their citizens in recovering unpaid wages either through a wage payment statute or common law contract rights. Many of the statutes either explicitly include vacation payments or have been interpreted to apply to them. New York and many of the *amici* states impose criminal penalties for the failure to pay vacation wages. ERISA preemption in this area would dramatically reduce the protection that workers now receive because federal law and enforcement mechanisms do not provide sufficient remedies for wrongfully denied vacation pay.

Civil and criminal wage and hour enforcement, including vacation pay regulation, is part of the traditional state role in protecting its citizens in the field of labor relations. *Amici* submit this brief because of their substantial interest in retaining the ability to protect workers from abusive employment practices.

Summary of Argument

This Court should grant certiorari in this case to address two issues concerning ERISA preemption which are of great importance to all states and which affect millions of employees. There is a sharp conflict between courts in

various jurisdictions as to whether ERISA preempts state regulation and enforcement of employers' obligations to pay vacation wages. These inconsistent decisions have created confusion among state governments which are unsure of the status of their enforcement efforts in this area.

The Court should grant certiorari to resolve the conflict and to prevent the negative results that the decision of the Supreme Judicial Court would have. Federal preemption of this area, which has long been regulated by the states, would result in severely weakened protection for workers who have been denied promised benefits.

This case also presents an important issue of ERISA preemption which has never been considered by this Court. This Court should grant certiorari to determine whether by exempting "generally applicable criminal laws" from ERISA preemption, Congress intended to exempt wage payment statutes, like the Massachusetts statute, and to allow states to continue to enforce their general criminal laws affecting the employment relationship.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUES PRESENTED ARE OF GREAT IMPORTANCE TO ALL STATES AND MILLIONS OF EMPLOYEES THROUGHOUT THE COUNTRY.

Most workers in America receive some form of paid vacation. In many instances employers permit vacation benefits to be taken during the year as vacation time or at the end of the year as payment in lieu of vacation. Many employers also pay accrued vacation to employees at the

termination of employment, either because it is the employer's policy to do so, or because state law requires such a payment.¹

Nearly every state has a statute which enforces the payment of wages. In addition to Massachusetts, at least forty-six states and the District of Columbia have wage payment statutes. Over half of these statutes explicitly include, or have been interpreted to include, vacation wages. Thirty-three of the states impose criminal sanctions.² Thus, the issues raised by the petition for a writ of certiorari affect most states and millions of employees in America.

A. This Court Should Resolve The Conflicting Decisions Concerning ERISA Preemption Of Vacation Pay.

Enforcement of an employer's obligations to compensate its employees has long been considered part of a state's role in protecting its citizens.³ Historically, federal laws

1. See e.g., *Suarez v. Plastic Dress-up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982); *Livestock Needs Inc. v. Local Union No. 1634*, 221 Miss. 492, 73 So.2d 128 (1954); *Valeo v. J.I. Case Co.*, 18 Wisc. 2d 578, 119 N.W.2d 384 (1963).

2. Appendix B of the Petition for a Writ of Certiorari is a list of these state statutes. The list indicates which statutes cover vacation wages and which ones impose criminal penalties.

3. In New York, for example, Labor Law § 198-a and § 198-c make it a misdemeanor for an employer to fail to pay agreed-upon wages or vacation pay. This statute has existed in some form since at least 1909. Labor Law § 198-a, Historical Note (McKinney 1986). Indeed, as early as 1910, a provision requiring railroad companies to pay their workers in cash semi-monthly and making it a misdemeanor to fail to do so, survived a constitutional challenge in the Court of Appeals and was found to be a valid exercise of a state's police powers. *The New York Central and Hudson River Railroad Company v. John Williams, as Commissioner of Labor*, 199 N.Y. 108,

(footnote continued on next page)

regulating employee compensation have permitted the state to establish or maintain parallel legislation providing similar or more protective rights, and have left them free to establish administrative mechanisms to make enforcement of claims a real possibility for workers who might otherwise be unable to obtain judicial enforcement. See, e.g., The Fair Labor Standards Act, 29 U.S.C. § 218(a); The Age Discrimination in Employment Act, 29 U.S.C. § 633; and The Civil Rights Act of 1964, 42 U.S.C. § 2000h-4.

In most of the *amici* states, administrative procedures exist to enforce employers' obligations to pay vacation wages. In New York State, for example, an employee who has been denied vacation pay can file a complaint with the State Department of Labor and have the state pursue the claim on his or her behalf. *Amici* consider the power to enforce these statutes, or an employee's common law contract rights, to be central to their role in protecting the welfare of the workers in our states.

However, these enforcement procedures and the ability to use these powers have been thrown into a state of confusion by conflicting decisions on whether ERISA preempts the states from enforcing laws that mandate the payment of

92 N.E. 404 (1910). Similarly, Massachusetts Gen. Law c. 149 § 148 has existed in some form since 1879 (see Historical Note, MGLA 1982) and in 1895, the justices of the Supreme Judicial Court found a law requiring manufacturers to pay their employees weekly, a constitutional exercise of state power. *In re House Bill No. 123* 40 N.E. 713, 163 Mass. 589 (1895). Other state statutes also date from the late nineteenth century. See e.g., Pa. Stat. Tit. 43 § 271 (Purdon 1964) (enacted in 1891); Wisc. Stat. § 109.03, Historical Note (W.S.A. 1988) (existing in some form since 1889).

vacation wages.⁴ In states where the courts have not ruled on whether state law is preempted by ERISA, state governments do not know whether to continue to enforce vacation pay laws. It is difficult, if not impossible, to give definitive advice to workers or employers. This Court should act to resolve this confusion about state jurisdiction over vacation pay.

The state and federal courts which have already ruled on this issue are split on whether state enforcement of vacation pay obligations is preempted by 29 USC § 1144(a).⁵ Two circuit courts and one state court have upheld state regulation in the area, *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987); *California Hospital Association v. Henning*, 770 F.2d 856 (9th Cir. 1985) cert. denied, 477 U.S. 904 (1986); *Erich v. GAF Corp.*, 110 N.J. 230, 540 A.2d 518 (1988) while two other circuit courts and Massachusetts in the instant case have held that ERISA preempts such state laws. *Holland v. National Steel Corp.*, 791 F.2d 1132 (4th Cir. 1986) *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985).

The cases which have permitted states to continue to regulate vacation pay have considered such pay an ex-

4. In New York there is even a conflict between state and federal courts. The Second Circuit in *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987) held that vacation wages were not subject to ERISA regulation while in *People v. Art Steel Co., Inc.*, 133 Misc.2d 1001, 509 N.Y.S.2d 715 (1986), the court held ERISA preempts the New York criminal wage collection statute as it applies to vacation wages.

5. 29 USC § 1144(a) provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

empted "payroll practice" under a U.S. Department of Labor regulation defining non-ERISA benefits. 29 C.F.R. § 2510.3-1(b). This regulation, promulgated shortly after ERISA's enactment, specifically excludes vacation wages from ERISA coverage because they are similar to ordinary wages. In describing why such benefits were excluded from coverage, the Department of Labor explained that:

Paid sick leave and paid vacations are not treated as employee benefit plans because they are associated with regular wages or salary rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area and there is no indication that Congress intended to subject these practices to Title I coverage.

40 Fed. Reg., no. 111, p. 24642 (1975).

The cases upholding state enforcement of vacation pay obligations have also looked to ERISA's history for guidance. In *California Hospital Association v. Henning*, 770 F.2d at 859, the Ninth Circuit discussed how, in adopting ERISA, Congress was primarily concerned with regulating private pension plans and that it sought to eliminate two principal abuses: the mismanagement of funds accumulated to finance benefits and the failure to provide such benefits. The court found that vacation wages "presented neither of the evils Congress intended to address . . . there is no fund to administer and no special risk of loss or non-payment. Nothing in the legislative history suggests Congress intended to regulate such payments." *Id.* at 859.

The cases supporting federal preemption of vacation pay regulation, on the other hand, have held, like the Massa-

chusetts court, that vacation pay is covered by ERISA because "vacation benefits" are one of the enumerated benefits in 29 U.S.C. § 1002(1), ERISA's definitional section.⁶ In the decision in this case, the Supreme Judicial Court of Massachusetts, without explanation, found Mass. Gen. Law c. 149, § 148, the regulation concerning payroll practices, inapplicable on the ground that it applied "only to an employer's discretionary practices and not to those contractually required". See *Brief for Petitioner*, P. A-12.

We urge this Court to grant certiorari in this case both to resolve the split in the circuits and the state courts and to avoid the negative result that the Massachusetts decision would have. The effect of ERISA preemption in the area of vacation pay would be to drastically reduce the protection that workers now have against employers who fail to pay them vacation wages. The extensive system of state regulation and enforcement in this area, both criminal and civil, would be replaced by what one commentator has called, a "regulatory vacuum". Note, *Unfunded Vacation Benefits, Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1703 (1987).

6. This part of the ERISA statute describes any "plan, fund or program" established "through the purchase of insurance or otherwise" providing "vacation benefits" as covered by ERISA. One recent commentator has argued that this section was not meant to be applied to ordinary vacation benefits but instead to those funded from a trust. Vacation benefits funded from a trust are generally pooled vacation plans that are set aside for employees, in industries such as construction or farming, who work for different employers during the year. The employers contribute to a central fund which pays out vacation benefits. Note, *Unfunded Vacation Benefits, Determining the Scope of ERISA*, 87 Colum. L. Rev. 1702, 1703 n. 12 (1987). See also, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 5 (1983).

In contrast to the state regulatory system, ERISA does not provide an administrative mechanism for the collection of benefits, 29 U.S.C. § 1132(a). An employee's only remedy for the nonpayment of vacation wages would be to sue in court and federal court would be available in all cases, no matter how small the claim. As the 7th Circuit has warned, federal preemption of vacation pay "could bring a host of trivial cases into the federal courts" *National Metalcrafters Division of Keystone v. McNeil*, 784 F.2d 817, 823 (7th Cir. 1986), cert. denied 107 S. Ct. 403 (1986).

Furthermore, the standard by which a vacation pay claim would be judged under ERISA is far weaker than the standard that is used by the states. Because there are no specific standards in ERISA regarding vacation benefits, any challenges would have to rely on the claim that an employer breached its fiduciary duty. Thus, rather than simply determining whether an employer breached a contractual obligation, the standard used would be whether the employer breached its fiduciary duty by acting arbitrarily and capriciously. See, e.g., *Pompano v. Michael Schiavone and Sons, Inc.*, 680 F.2d 911 (2d Cir. 1982). This standard might not be considered breached if an employer's decision was made to avoid substantial costs. See, e.g., *Jung v. EMC Corp.*, 755 F.2d 708, 711 (9th Cir. 1985). Thus, an employer could simply make a decision not to pay vacation wages because of the cost and under ERISA, its actions might well be protected regardless of past promises.

For these reasons, this Court should act to resolve the conflict surrounding the regulation of vacation benefits. States must know whether their continued enforcement of

vacation pay collection statutes is a valid exercise of state police power or whether they have been preempted by federal law. By granting certiorari in this case, this Court can make a definitive ruling on this issue.

B. This Court Should Determine A Substantial Issue Never Considered By The Court, Whether A Criminal Wage Collection Statute Is A "Generally Applicable Criminal Law" Excluded From ERISA Preemption.

The petition for a writ of certiorari also raises the issue of whether the Massachusetts wage collection statute is a generally applicable criminal law within the meaning of ERISA. ERISA specifically excludes from preemption "generally applicable criminal law[s]" 29 U.S.C. § 1144(b) (4). The Massachusetts Wage Collection statute in this case is a criminal statute. Thirty-three other states have similar criminal statutes.

Because the ERISA preemption cases previously decided by this Court are civil cases, this Court has never interpreted the phrase "generally applicable criminal law". The lower courts which have interpreted this term have issued conflicting decisions. The Court should provide the lower courts with guidance by granting certiorari to make a definitive ruling on this issue.

Under 29 U.S.C. § 1144(a), the provisions of ERISA "supersede [with certain exceptions] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." The exception set forth in § 1144(b) (4) provides that the preemption provision "shall not apply to any generally applicable criminal law of a state."

Because there is very little guidance in the history of ERISA from which to determine the meaning of this exception, courts have had little to rely on in interpreting the term "generally applicable." Several courts have included wage payment collection statutes within this exception because they are penal statutes which apply to all employees and do not specifically regulate benefit plans. *See, Upholsterer's International Union Health and Welfare Fund Trustees v. Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C. D. Ill. 1986); *National Metalcrafters Division of Keystone v. McNeil*, 602 F. Supp. 232 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); *Goldstein v. Mangano*, 99 Misc.2d 523, 417 N.Y.S.2d 368 (1978). Other courts, like the Supreme Judicial Court of Massachusetts, have interpreted "generally applicable" to apply only to criminal laws that apply to conduct which could be committed by all citizens, such as theft or embezzlement. Thus, under that interpretation, a person who steals from a benefits fund would not be exempt from criminal prosecution. *Sforza v. Kenco Construction Contracting*, 674 F. Supp. 1493 (D. Conn. 1986); *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Trustees of Sheet Metal Workers' International Association Production Workers' Welfare Fund v. Aberdeen Blower and Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983); *Commonwealth v. Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981).

A state's power to criminalize certain behavior and to enforce its criminal laws is central to a state's police power. By exempting "generally applicable" criminal laws from ERISA preemption, Congress recognized this and sought to avoid interference with a state criminal enforcement

scheme. We urge this Court to grant certiorari in this case to reaffirm this principle and resolve the existing dispute on the meaning of this exception.

Conclusion

For all of the foregoing reasons, this Court should grant certiorari to the Commonwealth of Massachusetts to review the significant questions of law raised by this case.

Dated: New York, New York
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